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THE UNITED STATES' USE OF DRONES IN THE WAR ON TERROR: THE (IL)LEGALITY OF TARGETED KILLINGS UNDER INTERNATIONAL LAW

*Milena Sterio**

After the terrorist attacks of September 11, 2001, the United States government began to use drones against al-Qaeda targets. According to several media reports, the United States developed two parallel drone programs: one operated by the military, and one operated in secrecy by the CIA. Under the Obama Administration, the latter program developed and the number of drone attacks in countries such as Pakistan and Yemen has steadily increased. Because the drone program is operated covertly by the CIA, it has been impossible to determine the precise contours of the program, its legal and normative framework, and whether its operators have been lawfully implementing the program. This article focuses on four distinct issues linked to the United States' use of drones: the definition of the battlefield and the applicability of the law of armed conflict; the identity of targetable individuals and their status as combatants or civilians under international law; the legality of targeted killings under international humanitarian law; and the location and status of drone operators. This article concludes that the Obama Administration, as well as any future administrations, should consider installing military-led drone operations, which would be subject to public scrutiny to ensure that the rule of law remains the guiding principle of the United States' use of force abroad.

* Associate Professor of Law, Cleveland-Marshall College of Law. The author would like to thank the Case Western Reserve University School of Law, and in particular, the Frederick K. Cox International Law Center, for the opportunity to present this paper at the September 7, 2012 annual conference entitled "Presidential Power, Foreign Affairs, and the 2012 Election."

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I. INTRODUCTION AND BACKGROUND ON THE USE OF
DRONES

After the terrorist attacks of 9/11, President George W. Bush, in his capacity as Commander-in-Chief, authorized the use of drones against leaders of al-Qaeda forces, pursuant to Congress' Authorization for Use of Military Force (AUMF).¹ Pursuant to AUMF, drones could be utilized against al-Qaeda forces to target or to kill enemies. It has been reported that the United States possesses two types of drones: smaller ones, which predominantly carry out surveillance missions, and larger ones, which can carry hellfire missiles and have been used to conduct strikes and targeted killings.² Drone strikes have been carried out by both the military as well as the CIA. As Jane Mayer famously noted in her article:

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.³

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1. S. J. Res. 23, 107th Cong. (2001) (enacted). This article, perhaps regrettably, does not examine issues related to AUMF, to the legality of the drone program under AUMF, or any constitutional issues linked to the exercise of broad military powers by the executive branch. Moreover, this article utilizes the term "drone." Other terms used in academic debate include "unmanned aerial vehicles" and "remotely-piloted aircraft." While the latter two may be more technologically accurate, this article adopts the popular term "drone."
 2. See Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 104 (2010).
 3. Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (Oct. 26, 2009).

Moreover, although the President had designated Afghanistan and its airspace as a combat zone, the United States has used drones in other areas of the world, such as Yemen, where al-Qaeda forces have been targeted and killed.⁴ In fact, the U.S. approach for the use of drones is that members of al-Qaeda forces may be targeted anywhere in the world: that the battlefield follows those individuals who have been designated as enemies due to their affiliation with al-Qaeda.⁵ While many in the international community have criticized the United States' expansive geographical use of drones against al-Qaeda forces,⁶ officials in the Bush Administration have defended the drone program as consistent and conforming to international law.⁷ President Obama has continued this approach and has expanded the use of drones in the war on terror.⁸ Moreover, high-level officials in the Obama Administration have offered detailed legal justifications for the legality of the American drone program.

Harold Koh, State Department Legal Advisor, justified the use of drones at the American Society of International Law Annual Meeting on March 25, 2010, arguing "it is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."⁹ In his speech, Koh cited both domestic law (AUMF) and international law as proof that the United States is engaged in armed conflict with al-Qaeda, the Taliban, and "associated forces."¹⁰ Targeted killings, according to Koh, are justified because they are performed in

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4. Michael W. Lewis & Vincent J. Vitkovsky, *The Use of Drones and Targeted Killing in Counterterrorism*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 73, 73 (2011).
 5. See *id.* (noting that under this approach, "al Qaeda terrorists who continue to plot attacks may, in appropriate circumstances, be lawful subjects of armed attack without regard to their location").
 6. One of the most vocal critics of the drone program has been Professor Mary Ellen O'Connell. See, e.g., Mary Ellen O'Connell, Remarks, *The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 592 (2010). See also Hina Shamsi, *Afghanistan, Pakistan, and the Modern Challenges to Use of Force Law*, 104 AM. SOC'Y INT'L L. PROC. 161, 166-68 (2010) (demanding the United States provide a detailed analysis to the general public justifying its killings abroad).
 7. See Lewis & Vitkovsky, *supra* note 4, at 74.
 8. *Id.* at 73.
 9. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law 14, available at <http://www.state.gov/documents/organization/179305.pdf> (Mar. 25, 2010).
 10. *Id.*

accordance with the laws of war.¹¹ In other words, the United States conducts targeted strikes consistent with the well-known principles of distinction and proportionality to ensure that the targets are legitimate and collateral damage minimized.¹²

Koh offered four reasons supporting the legality of targeted drone killings. First, enemy leaders are legitimate targets because they are belligerent members of an enemy group in a war with the United States.¹³ Second, drones can constitute appropriate instruments for such missions, so long as their use conforms to the laws of war.¹⁴ Third, enemy targets are selected through “robust” procedures; as such, they require no legal process and are not “unlawful extrajudicial” killings.¹⁵ Finally, Koh argued that using drones to target “high level belligerent leaders” does not violate domestic law banning assassinations.¹⁶

The Obama Administration has continued to use drones in Pakistan, as well as in Yemen. Increasingly, however, the American drone program has been run by the CIA.¹⁷ Leon Panetta, the CIA Director, has praised the drone program stating that drones were “the only game in town.”¹⁸ On September 30, 2011, a CIA-operated drone targeted and killed an American citizen in Yemen, Anwar al-Awlaki.¹⁹ Al-Awlaki had been accused of holding prominent roles within the ranks of al-Qaeda and had been placed on a hit list, authorized by President Obama.²⁰ His assassination marked the first time in history an American citizen had been targeted abroad without any judicial involvement or proceedings to determine guilt of any crime.

In a subsequent speech, Attorney General Eric Holder confirmed the Obama Administration’s view on the legality of targeted killings, including killings of American citizens. On March 5, 2012, in a speech at Northwestern University, Holder claimed targeted killings of American citizens are legal if the targeted citizen is located abroad, a

11. *Id.*

12. *Id.*

13. *Id.* at 15.

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Mayer, *supra* note 3.

18. *U.S. Air Strikes in Pakistan Called “Very Effective,”* CNN, <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (May 18, 2009, 6:48 PM).

19. *Al Qaeda’s Anwar al-Awlaki Killed in Yemen*, CBS, http://www.cbsnews.com/2100-202_162-20113732.html (Sept. 30, 2011, 1:22 PM).

20. *See* Lewis & Vitkowsky, *supra* note 4, at 75.

senior operational leader of al-Qaeda or associated forces, actively engaged in planning to kill Americans, poses an imminent threat of violent attack against the United States (as determined by the U.S. government), and cannot be captured; such operations must be conducted in a manner consistent with applicable law of war principles.²¹

Despite Koh's and Holder's justifications, many have questioned the legality of the American use of drones to perform targeted killings of al-Qaeda members and of U.S. citizens. Philip Alston, UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has famously stated his concerns that drones "are being operated in a framework which may well violate international humanitarian law and international human rights law."²² This article highlights some of the most relevant issues surrounding the (il)legality of targeted killings under the current approach of the Obama Administration. This article concludes that most targeted killings are illegal under international law; only a very small number of such killings, performed under carefully crafted circumstances, could potentially comply with the relevant rules of *jus ad bellum* and *jus in bello*, and only if one accepts the premise that the United States is engaged in an armed conflict against al-Qaeda. This article discusses the following issues related to the use of drones to perform targeted killings: the definition of the battlefield and the applicability of the law of armed conflict (Part II); the identity of targetable individuals and their status as combatants or civilians under international law (Part III); the legality of targeted killings under international humanitarian law (Part IV); and the location and status of drone operators (Part V).

II. WHAT AND WHERE IS THE BATTLEFIELD? WHICH LAWS APPLY?

Under the Bush Administration approach, the United States post 9/11 was engaged in a global war against terrorists. Under this expansive approach, the war had no geographic constraints, and the battlefield was of a global nature.²³ In other words, the war followed

21. See Eric Holder, Attorney General, U.S. Dep't of Just., Speech at Northwestern University School of Law (Mar. 5, 2010), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

22. *US Warned on Deadly Drone Attacks*, BBC, <http://news.bbc.co.uk/2/hi/8329412.stm> (Oct. 28, 2009, 5:40 PM).

23. See, e.g., O'Connell, *supra* note 6, at 595 (noting that under the Bush Administration approach, "we could kill al Qaeda members if they were in the U.S., Germany, Switzerland, and elsewhere based on a suspect's presence").

the terrorist enemies, and wherever they were located was where the battlefield could be temporarily situated. According to the Bush Administration, as well as the U.S. Supreme Court case *Hamdan v. Rumsfeld*, the United States was at war against al-Qaeda and Taliban forces, and the applicable laws were the laws of war.²⁴ Thus, military force, including the use of drones, could be used if consistent with the laws of war.

Under the Obama Administration, the rhetoric has slightly changed: the United States is no longer engaged in a global war on terror but rather, in a war against al-Qaeda, the Taliban, and associated forces.²⁵ However, the Obama Administration, by conducting drone strikes in a variety of locations, including Pakistan and Yemen, has followed the Bush Administration view of the global battlefield. The Obama Administration believes, like the Bush Administration, that the laws of war apply to the use of drone strikes because the United States is engaged in an armed conflict.²⁶ Moreover, the Obama Administration has claimed drones can be used in countries that harbor terrorist enemies and are unwilling or unable to control territory where such enemies are located.²⁷ This rationale would likely exclude places like England and France from the possible definition and localization of the battlefield, but would purport to justify the use of drones in places like Pakistan and Yemen, where remote territories are hard to control and where central governments cannot claim to possess effective control.²⁸

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24. See, e.g., Vogel, *supra* note 2, at 107 (noting that “the Executive Branch has consistently characterized the current conflicts to be armed conflicts, governed primarily by the *lex specialis* of the laws of war” in both the Bush and Obama Administrations); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (characterizing the conflict with al-Qaeda as armed conflict to which the laws of war apply); see also *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004).
25. See Koh, *supra* note 9, at 13–15 (identifying al-Qaeda, the Taliban, and associated forces as targets of U.S. operations).
26. See Vogel, *supra* note 2, at 107.
27. Koh, *supra* note 9, at 14 (noting that the decision of “whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses”).
28. See, e.g., Vogel, *supra* note 2, at 130–33 (discussing the location of the strikes, concluding that strikes can most likely be lawfully conducted in places of “hot conflict” like Pakistan, Somalia, and Yemen, but questioning whether the United States would ever opt for strikes in more neutral places such as Kenya, the Philippines, or Saudi Arabia).

The above described terminology (“global war on terror” and “war against al-Qaeda, the Taliban, and associated forces”) is vastly important, as it designates the applicable legal framework surrounding targeted killings and drone strikes. If one accepts the premise that the United States is engaged in armed conflict against al-Qaeda terrorists, then one has to conclude that laws of war apply.²⁹ If laws of war apply, then the rules of *jus ad bellum* determine whether military force is utilized in a lawful way. In fact, laws of war permit targeted killings if two particular requirements of *jus ad bellum* are satisfied: the use of force is necessary and the use of force is proportionate.

First, a state resorting to force must prove its decision to resort to force was a result of an armed attack and necessary to respond to such attack.³⁰ It is possible to argue that al-Qaeda’s campaign of terrorist attacks against the United States, including 9/11, corresponded to an armed attack. However, it is also possible to argue that “al Qaeda’s campaign against the United States does not trigger the right of self-defensive force . . . because al Qaeda has not launched a full scale military offensive.”³¹ Another difficulty in this context is that al-Qaeda is not a state, and under traditional international law, only states could initiate armed attack against states, thus triggering the right to self-defense.³² While some commentators have argued that the use of force in self-defense against a non-state actor should be

29. An additional inquiry here is whether the United States is engaged in an international armed conflict, or in an internal armed conflict against al-Qaeda. International armed conflicts are governed by the 1907 Hague Conventions, the four Geneva Conventions of 1949, customary law, and the first Additional Protocol to the Geneva Conventions. Non-international armed conflicts are governed by Common Article 3 of the Geneva Conventions, custom, domestic law, and the second Additional Protocol to the Geneva Conventions. Some have even suggested the existence of a third category of internationalized non-international armed conflicts. For a more detailed discussion of these issues, see Vogel, *supra* note 2, at 110–14. This inquiry goes beyond the scope of this article; moreover, this inquiry is not dispositive of the issues posed by this article, which will refer to all of the above-mentioned conventions. It should be noted that the Obama Administration has taken the position that the United States is engaged in a non-international armed conflict against al-Qaeda, Taliban, and their associated forces. See Koh, *supra* note 9, at 12.

30. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 196–200 (June 27) [hereinafter *Nicaragua case*].

31. Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 737 (2011).

32. Sikander Ahmed Shah, *War on Terrorism: Self-Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 93–94 (2010).

permissible, “[i]n an era where non-state groups project military-scale power,”³³ this view remains controversial.³⁴

Second, a state resorting to the use of force must prove its use of force was proportionate to the military campaign’s objective.³⁵ The proportionality test of *jus ad bellum* should “be applied contextually, to determine whether the overall goal of a use of force . . . is a proportionate objective.”³⁶ Because the CIA operates the drone program in Pakistan in secrecy, it is impossible to determine conclusively whether the program meets the proportionality requirement of *jus ad bellum*. It is possible to argue the resort to targeted killings through the use of drones is at least sometimes necessary and proportionate (for example, when a U.S. military commander possesses information that a high-value al-Qaeda operative, engaged in planning armed attacks against Americans, is located in a specific location which is relatively easily reachable via drones, and the commander decides that neutralization of the al-Qaeda target is necessary to prevent attacks against Americans). It is probable that many drone strikes do not meet the requirements of *jus ad bellum*, but it is nonetheless difficult to conclude, under this approach, that the entire drone program is per se illegal. Should the U.S. government—specifically the CIA—release more facts regarding the drone program, it may become plausible to assess the lawfulness of this type of force through the *jus ad bellum* prism.

If, however, one rejects the conclusion that the United States is engaged in armed conflict, then the legality of the entire drone program becomes questionable. One could logically conclude the United States is not fighting a true war, but chasing terrorists. Under this view, the law of armed conflict would no longer apply, and the United States could use force against such terrorists only under a law enforcement paradigm—only when the use of force is absolutely necessary. Moreover, if the laws of war do not apply, then international human rights law dictates that targeted killings are legal only if a threat imminent and the reaction necessary, because under human rights law, “it is never permissible for killing to be the sole

33. Orr, *supra* note 31, at 739.

34. For one of the leading opponents of the view that al-Qaeda forces, as a non-state actor, can launch an armed attack within the meaning of Article 51 of the UN Charter (self-defense), see Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 13 (Notre Dame L. Sch., Research Paper No. 09–43, 2010).

35. For a detailed analysis of the proportionality test under *jus ad bellum*, see *Nicaragua case*, *supra* note 30, ¶¶ 194, 237.

36. Orr, *supra* note 31, at 738 (quoting Robert D. Sloan, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE INT’L L. 47, 69 (2010)).

objective of an operation.”³⁷ “[A] killing is only legal to prevent a concrete and imminent threat to life, and, additionally, if there is no other non-lethal means of preventing that threat to life.”³⁸ The International Covenant on Civil and Political Rights (ICCPR) prohibits “arbitrary” killing, as well as punitive or deterrent killings of terrorists.³⁹ The very nature of the American drone program, where targeted killings are utilized to neutralize al-Qaeda operatives, even though such killings are not absolutely necessary, is contrary to international human rights law. Under this paradigm, one must conclude that the drone program is illegal.

III. WHO ARE THE TARGETS?

The second question related to the use of drones has to do with the targets themselves: who can be targeted and under what circumstances? This issue depends on the above-mentioned inquiry about the nature of the conflict with al-Qaeda. If the United States is engaged in an armed conflict and the laws of war apply, then lawful combatants can be targeted, unless they have surrendered and are *hors de combat*.⁴⁰ Lawful combatants are defined in the Geneva Conventions and the Additional Protocols to the Geneva Conventions

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37. Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, ¶ 33, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).
38. Sebastian Wuschka, *The Use of Combat Drones in Current Conflicts—A Legal Issue or a Political Problem?*, 3 GOETTINGEN J. INT’L L. 891, 898 (2011).
39. International Covenant on Civil and Political Rights, art. 6(1), Dec. 19, 1966, 993 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, ¶ 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (discussing the committee’s concerns with targeted killings).
40. *See* Wuschka, *supra* note 38, at 898; *see also* Lewis & Vitkowski, *supra* note 4, at 73 (noting that combatants may not be targeted if they are *hors de combat*). Another relevant and interesting issue raised by the rule that combatants may not be targeted if they are *hors de combat* can be illustrated by the following hypothetical: what if al-Qaeda combatants (in the true sense of the word) are targeted by a drone strike attempt to surrender, by waving a white flag a few seconds after they realize that they are being pursued by a drone? Is the drone operator under a legal obligation to abort the targeting operation because the combatants are no longer engaged in combat? To the extent that drone technology does not allow for this outcome, because the drone operator at that point no longer possesses the capability to halt the operation, do drones become unlawful weapons? This question remains outside the scope of this article but will hopefully remain the subject of many academic debates and scholarly writings in the future.

as all members of the armed forces of a state party to a conflict.⁴¹ In fact, under Article 4 of the Third Geneva Convention, lawful combatants are either members of a state's armed forces or militia, report to a responsible chain of command, distinguish themselves by wearing distinctive signs or uniforms, carry arms openly, or conduct their actions in compliance with the laws and customs of war.⁴² Individuals who do not qualify as lawful combatants are civilians and may never be targeted.⁴³

Under the laws of war, al-Qaeda members can be targeted if they qualify as lawful combatants; if not, then they are civilians and are protected from military strikes. If one accepts the premise that the United States is engaged in armed conflict, then one should logically have to conclude that al-Qaeda members are lawful combatants—otherwise, the characterization of the conflict as true war makes little sense. After all, the United States cannot be the only true warrior in the armed conflict against al-Qaeda. This conclusion is easily reachable if one adopts a looser interpretation of the Geneva Conventions by recognizing that in most modern-day wars members of armed forces do not always wear uniforms and carry arms openly. Unlike World War II, modern-day wars are fought by armies and militias that may appear civilian and may not resemble traditional soldiers. Nonetheless, some have adopted a strict interpretation of the Geneva Conventions and advanced the idea that al-Qaeda members are civilians because they do not possess the above-mentioned characteristics of true soldiers under the laws of war.⁴⁴

Civilians can only be targeted if they participate directly in the hostilities.⁴⁵ The requirements of direct participation in hostilities are not elaborated upon in either the Geneva Conventions or the Additional Protocols. However, these requirements have been discussed at length in a study by the International Committee of the Red Cross (ICRC) and in Israeli Supreme Court case law.⁴⁶ According

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(2), Jan. 23 1979, 1125 U.N.T.S. 3 [hereinafter Protocol I].

42. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

43. Protocol I, *supra* note 41, art. 51(3).

44. See, e.g., Vogel, *supra* note 2, at 119 (concluding that “[m]embers of al Qaeda, the Taliban, and their associates do not meet the requirements of lawful combatancy, and therefore are unlawful combatants or unprotected civilians” (footnote omitted)).

45. See Protocol I, *supra* note 41, art. 51(3).

46. See Wuschka, *supra* note 38, at 899.

to the ICRC study, direct participation contemplates a specific act, and civilians lose protection against direct attacks as long as they are participating in such specific hostile acts.⁴⁷ To the contrary, members of an armed group remain direct participants in the hostilities for the entire duration of their membership in the given armed group, because of their constant combat function.⁴⁸ Under the ICRC approach, al-Qaeda members could be targeted only if one could prove that particular targets were directly engaged in the hostilities. This view would seriously restrict the choice of targets and shed further doubt on the legality of the entire drone program. Under the Israeli Supreme Court approach, however, the relevant inquiry is “whether civilians are performing the *function* of combatants.”⁴⁹ Civilians who only perform sporadic hostile acts are entitled to protection from direct attacks once they detach themselves from such acts. However, permanent members of terrorist groups lose their civilian status and protection.⁵⁰ Based on the Israeli Supreme Court view, members of al-Qaeda could be targeted because they would have lost civilian status through their membership in a terrorist organization. While some scholars have supported this view, many others have criticized it, and it is fair to assert that this view has not reached unanimous approval in the international community.

Thus, if al-Qaeda members were considered civilians, they could be targeted only if they participate directly in the hostilities; this requirement has not been conclusively defined in international law and each targeting operation would have to be carefully analyzed to determine whether a particular individual could be targeted. It should be noted that the Obama Administration has argued that individuals who are part of an armed group are “belligerents and, therefore, lawful targets under international law.”⁵¹ The Obama Administration has seemingly rejected the ICRC approach and adopted a more aggressive tactic in determining which individuals can be targeted.

In addition to the debate over the status of al-Qaeda forces as combatants versus civilians, some have advanced the idea that members of al-Qaeda are unlawful combatants—that they do not

47. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 43–46 (2009).

48. See *id.* at 31–36 (discussing various criteria for membership in armed groups).

49. Helen Keller and Magdalena Forowicz, *A Tightrope Walk Between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing*, 21 LEIDEN J. INT’L L. 185, 207 (2008).

50. HCJ 769/02 Public Committee Against Torture in Israel v. Israel 53(4)PD 817, ¶ 39 [2005] (Isr.).

51. Koh, *supra* note 9, at 15.

qualify as lawful combatants because they do not fight pursuant to the rules of the laws of war, but that they do not qualify as civilians either precisely because they are engaged in a fight against the United States.⁵² According to Yoram Dinstein,

[A] person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status⁵³

Under this view, members of al-Qaeda could be targeted, because they are not civilians, but would not enjoy the protections the law of war offers to lawful combatants. This view has not been immune to criticism.⁵⁴ Moreover, this view appears asymmetrical and almost unfair: on the one hand, it asserts that forces like al-Qaeda may be liberally targeted as combatants, while on the other hand dictating that they be deprived of any protections derived through combatant status. Yoram Dinstein may be correct in his description of persons who wear “two caps,” but many would dispute his assertion that such a person is neither civilian nor combatant. A better view may be to either classify members of al-Qaeda as combatants or as civilians participating directly in hostilities.

If one rejects the conclusion that the United States is engaged in armed conflict against al-Qaeda, then any forceful action against al-Qaeda targets would have to be analyzed through a law enforcement paradigm and international human rights law would apply. Under this approach, individuals could not be targeted unless the threat the individuals pose is imminent and the targeting is necessary.⁵⁵ Thus, as stated above, the drone program would have to be deemed illegal under this approach, because of impermissible targeting practices.

Finally, if targets of drone strikes are American citizens, additional constitutional issues shed further scrutiny on the legality of such attacks. Recently, an American citizen, Anwar al-Alwaki was

52. See Vogel, *supra* note 2, at 119.

53. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29 (1st ed. 2004).

54. See, e.g., Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 *LAW & INEQ.* 195, 208–10 (2004) (arguing no one can fall between the protections of civilian status and lawful combatant status and thus fail to be protected by either status).

55. See *supra* Part II on the applicability of international human rights law to the use of drones and targeted killings.

targeted and killed in a drone strike in Yemen.⁵⁶ Many have criticized the resort to targeted killings against a U.S. citizen.⁵⁷ The U.S. Constitution entitles all those it protects to due process.⁵⁸ Attorney General Holder stated in his speech in March 2012 that due process did not equal judicial process, thereby implying that judicial oversight and review was not necessary before the executive ordered the targeted killing of an American citizen.⁵⁹ This view has been heavily criticized, and many have lamented that the executive, under this view, determines who can be targeted, when and where, with no judicial or other oversight.⁶⁰ Thus, if targets of drone strikes are American citizens, the legality of such strikes becomes more dubious and less politically and morally acceptable.

IV. LEGALITY OF DRONE STRIKES UNDER *JUS IN BELLO*?

The next question raised by the recent use of drones is one of *jus in bello*: is the way in which drones are being used legal? The above discussion on the definition of the battlefield and the identity of targets raised issues of *jus ad bellum*, or the lawfulness of the entire drone program. If one were to conclude that the program is not per se illegal, one would nonetheless have to examine how and under what circumstances drones were being used. This issue is one of *jus in bello*.⁶¹

Jus in bello dictates that force may be used only if such use respects the principles of necessity, proportionality, distinction, and humanity.⁶² The principle of military necessity requires that armed attacks during wartime be limited to military objectives and offer a

56. See *Al Qaeda's Anwar al-Awlaki Killed in Yemen*, *supra* note 19.

57. See Rebecca Nelson, *Targeted Killing of U.S. Citizens Lawful, Says Holder, but Critics Pounce*, MEDILL NATIONAL SECURITY ZONE, <http://nationalsecurityzone.org/site/targeted-killing-of-u-s-citizens-lawful-says-holder-but-critics-pounce/> (Mar. 19, 2012) (noting the widespread criticism of Holder's asserted legal justifications for targeted killings of U.S. citizens).

58. U.S. CONST. amend. V.

59. See Holder, *supra* note 21.

60. See, e.g., Nathan Freed Wessler, *In Targeted Killing Speech, Holder Mischaracterizes Debate over Judicial Review*, ACLU BLOG OF RIGHTS, <http://www.aclu.org/blog/national-security/targeted-killing-speech-holder-mischaracterizes-debate-over-judicial-review> (Mar. 5, 2012).

61. See, e.g., O'Connell, *supra* note 6, at 589 (noting the decision to use drones is governed by *jus ad bellum*, but once drones are in use, they are governed by *jus in bello*).

62. For a detailed discussion of the legality of the use of drones under *jus in bello*, see Vogel, *supra* note 2, at 114–29.

well-defined military advantage.⁶³ Thus, only measures which are “indispensable for securing the complete submission of the enemy as soon as possible” should be undertaken.⁶⁴ The principle of proportionality requires a complex analysis, “taking into account factors such as the military importance or exigency of the target.”⁶⁵ Thus, Article 51(5) of Additional Protocol I prohibits “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁶⁶ Article 57, in addition, prohibits military planners from launching attacks “which may be expected to cause incidental . . . [but excessive] loss[es] . . . in relation to the concrete and direct military advantage anticipated.”⁶⁷ The principle of distinction requires that parties to a conflict distinguish at all times between combatants and civilians, as well as between military and civilian objects.⁶⁸ In addition, this principle protects civilians from all attacks, and prohibits indiscriminate attacks.⁶⁹ However, the principle of distinction does not forbid civilian casualties; rather, targeting decisions “must avoid civilian casualties that are excessive in relation to the anticipated military advantage.”⁷⁰ In other words, the principle of distinction permits targeting of individuals “who commit specific acts likely to influence military action.”⁷¹ Finally, the principle of humanity generally prohibits parties to a conflict from using weapons calculated to cause unnecessary suffering.⁷² “The principle of humanity may be understood as the capstone of the other constraining principles, requiring parties to a conflict to exercise restraint when an act would cause superfluous injury or unnecessary suffering, even if it meets the requirements of necessity, distinction, and proportionality.”⁷³

In sum, under *jus in bello*, force may be used if the military objective sought is necessary, if the suffering caused by the use of

63. Protocol I, *supra* note 41, art. 52(2).

64. U.S. ARMY LAW OF WAR HANDBOOK 164 (Maj. Keith E. Puls ed., 2005).

65. W. Michael Reisman, Comment, *The Lessons of Qana*, 22 YALE J. INT’L L. 381, 395 (1997).

66. Protocol I, *supra* note 41, art. 51(5)(b).

67. *Id.* art. 57(2)(a)(iii).

68. *Id.* art. 48.

69. *Id.* art. 51(2)–(4).

70. Orr, *supra* note 31, at 748.

71. *Id.* at 749.

72. Protocol I, *supra* note 38, art. 35(2).

73. Vogel, *supra* note 2, at 127–28.

force is proportionate to the military objective, if the military commander can properly distinguish between military and non-military targets, and if the military commander has adopted limited means of injuring the enemy, which minimize unnecessary suffering. It is possible that drones could, under carefully crafted circumstances, satisfy the rules of *jus in bello*. For example, if a military commander decided to launch a drone attack against a well-known military target, if such a drone attack would advance significant military objectives, if the drone attack would not harm civilians to a degree disproportionate to the military objective sought, and if the drone attack would not cause unnecessary suffering, such a drone attack could comply with *jus in bello*. In fact, the Obama Administration has claimed its drone program satisfies all the requirements of *jus in bello* because "targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects."⁷⁴ Due to the secrecy of the CIA-operated drone program, this assertion unfortunately remains unverifiable.

Very few courts have ever dealt with the issue of the legality of the use of drones under *jus in bello*. However, the International Court of Justice has struggled with similarly difficult issues in its advisory opinion on the legality of the use of nuclear weapons.⁷⁵ The World Court was unable to conclude that the use of nuclear weapons could never satisfy the rules of international law.⁷⁶ Similarly, it would be hard to conclude that the use of drones could never satisfy the requirements of *jus in bello*. However, it is likely that many already launched drone attacks have failed to fulfill these requirements, and one could only hope that in the future, drone operators consider such rules of *jus in bello* with most careful attention. Because, as mentioned above, the drone program appears to be mainly operated by the CIA and because very little information is publicly known about the details of drone attacks, it is impossible to perform the *jus in bello* analysis in order to assess the legality of particular strikes. Media reports as to the number of attacks and number of civilian casualties vary, prompting many in the international community to call for more accountability on behalf of the Obama Administration.

74. Koh, *supra* note 9, at 15.

75. See generally *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 257 (July 8).

76. *Id.* ¶ 95. The ICJ concluded:

[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Id. ¶ 105(E).

If the Administration is correct in its assessment that the drone program satisfies *jus in bello* requirements, then it should provide more information to the public about the program. Secrecy in this context reinforces the sense of illegitimacy.

V. LOCATION AND IDENTITY OF DRONE OPERATORS

The final question raised by the drone program has to do with drone operators themselves. Some have alleged the United States conducts two separate drone programs: one by the military and the other by the CIA.⁷⁷ If drone operators are members of American armed forces, then they are lawful combatants who enjoy all the protections accorded to such status by the Geneva Conventions.⁷⁸ More importantly, perhaps, members of the armed forces are trained in the use of force, know when and how force can be used, and are subject to disciplinary action if they do not follow such rules.⁷⁹ CIA operatives, on the other hand, are not lawful combatants and do not enjoy any Geneva Convention protections; they are either civilians or unlawful enemy combatants, as discussed above in the context of the status of al-Qaeda members.⁸⁰ CIA operatives are not trained in the use of force and do not face court-martial or other disciplinary action. In fact, the CIA drone program has been secret, and no particular information regarding the specifics of the program has ever been publicly disclosed.⁸¹ The identity of the operators may not be dispositive of all the legal issues discussed above. However, the selection of drone operators as CIA personnel rather than then members of U.S. armed forces may reflect a particular political choice and may, unfortunately, cast more doubt about the legitimacy and lawfulness of the entire drone program.

Further, the location of drone operators may pose additional questions regarding the lawfulness of drone operations. Although the CIA program has been largely secret, reports have surfaced that drone operators tend to be located in the United States, far away from battle fields in Afghanistan, Pakistan, Somalia, or Yemen.⁸² Some

77. See, e.g., Mayer, *supra* note 3.

78. See Vogel, *supra* note 2, at 136 (discussing the obligation of members of the armed forces to abide by the laws of war, thus securing law of war protections for themselves).

79. See *id.*

80. Vogel, *supra* note 2, at 134–35.

81. *Id.* at 135–36 (noting that regarding CIA operation of drones, “the public does not know what rules apply and neither does the enemy, in contrast to the military’s requirement for transparency in promulgating its rules and regulations”).

82. *Id.* at 132.

have criticized this phenomenon by arguing that warfare has turned into a video game, where lethal weapons are launched through the click of a button.⁸³ A drone operator tucked away into the safety of CIA offices in Nevada or Arizona deploys highly dangerous arms which can cause hundreds of deaths in a matter of seconds, without any risk to the operator or any of his or her associates.⁸⁴ As Army Chaplain D. Keith Shurtleff has noted, “as wars become safer and easier, as soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen, there is a very real danger of losing the deterrent that such horrors provide.”⁸⁵ The fact that war has become dehumanized and human casualties eliminated for the drone operator side leads some to question whether war has become too easy and whether decisions to engage in lethal operations will be taken too lightly.⁸⁶ Thus, “an obscure . . . computer-human status issue” may be emerging in this area;⁸⁷ possible questions include whether a computer can truly make life or death decisions, whether the absence of a human in a lethal military operation may remove all deterrents to violations of the laws of war, and whether human judgment is necessary to exercise restraint in situations of armed conflict.

While *jus ad bellum* and *jus in bello* do not contain any particular requirements regarding the location of drone operators, it is fair to assume that when these rules were drafted, remotely operated weapons like drones were not contemplated. Thus, it is arguable that while *jus ad bellum* and *jus in bello* do not contain prohibitions on the use of drones remotely operated from places far away from actual conflicts, newly developed weapons like drones may require development of better-suited rules of armed conflict for the future. Certainly, the use of remotely operated weapons like drones poses questions of a moral and humanitarian magnitude, which the rule of law should also contemplate in the near future.

83. See *id.* at 133 (noting that commentators have compared the operation of drones to a video game); Orr, *supra* note 31, at 735 (noting that “[p]ilots’ in the United States control the drones using joysticks”).

84. Orr, *supra* note 31, at 735 (noting that “an obvious advantage of the program is the lack of risk to an on-board pilot”).

85. P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 396 (2009).

86. See *id.* (“Otherwise nice and normal people create psychic doubles that carry out sometimes terrible acts that their normal identity would never do These weapons don’t just create greater physical distance, but also a different sort of psychological distance and disconnection.”).

87. Vogel, *supra* note 2, at 136.

VI. CONCLUSION

The use of drones to perform targeted killings in remote locations of Pakistan and Yemen is riddled with difficult legal questions. These questions have been impossible to answer because of the secrecy surrounding the CIA drone program. If the United States is truly engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces, it can be argued that drone attacks are not per se illegal, and that, if performed under carefully elaborated rules and guidelines, they could satisfy the relevant rules of *jus in bello*. Issues that remain unanswered are those regarding the nature of the conflict that the United States has been engaged in since 9/11, as well as those regarding the details of CIA-led drone operations, without which rules of *jus in bello* cannot be analyzed. The Obama Administration, as well as any future administrations, should consider installing military-led drone operations, which would be subject to public scrutiny to ensure that the rule of law remains the guiding principle of U.S. use of force abroad.

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